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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Appl. No. : 10/009,285
Applicant : Nieendick et al.
Filed : November 6, 2001
TC/A.U. : 1623
Examiner : Necholus Ogden, Jr.

Confirmation Number: 5702

Docket No. : H 4119 PCT/US
Customer No.: 23657

CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited with the U.S. Postal Service as first class mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on June 3, 2004.

June 3, 2004
Date

Marlene Capreri
Signature of certifier

Marlene Capreri
Typed or printed name of certifier

APPEAL BRIEF TRANSMITTAL

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 222313-1450

Sir:

Appellants' brief, in triplicate, is transmitted herewith in accordance with 37 CFR 1.192.

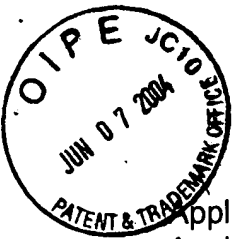
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The Commissioner is hereby authorized to charge any deficiency in the required fee or to credit any overpayment to Deposit Account 50-1177.

Respectfully submitted,

Cognis Corporation
300 Brookside Avenue
Ambler, PA 19002

Steven J. Trzaska
Steven J. Trzaska
(Reg. No. 36,296)
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Applicant : Nieendick et al. Confirmation No.: 5702
Appl. No. : 10/009,285
Filed : 11/06/2001
Title : HIGHLY CONCENTRATED FREE-FLOWING PEARLY LUSTRE
CONCENTRATES

Grp./A.U. : 1751
Examiner : Necholus Ogden, Jr.

Docket No. : H 4119 PCT/US
Customer No.: 23657

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Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

BRIEF ON APPEAL UNDER 37 C.F.R. 1.192

Sir:

REAL PARTY IN INTEREST

The real party in interest is Cognis Deutschland GmbH & Co. KG,
Henkelstrasse 67, 40589 Duesseldorf, Germany.

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RELATED APPEALS AND INTERFERENCES

None.

STATUS OF CLAIMS

Claims 11 and 13-20 are the subject of this appeal.

STATUS OF AMENDMENTS

No amendments were made after final rejection.

SUMMARY OF THE INVENTION

Briefly stated, the present invention is directed to a concentrated, flowable pearlizing composition containing (a) from about 25 to 45% by weight of a pearlizing wax, (b) from about 25 to 40% by weight of a nonionic, amphoteric, zwitterionic and/or cationic emulsifier, and (c) from about 0.5 to 15% by weight of a polyol ester, with the remainder, water, and wherein the sum of (a) + (b) + (c) is at least about 55% by weight. See page 2, line 29 to page 3, line 8.

ISSUES

Whether claims 11 and 13-20 are anticipated under 35 U.S.C. § 102(e) by Ansmann et al. (US 6,228,831).

GROUPING OF THE CLAIMS

The claims stand and fall together.

ARGUMENT

Ansmann '831 fails to anticipate the claimed invention on the grounds that it fails to disclose each and every element thereof.

Appellant would first like to note that it is well settled in the law that a factual determination of anticipation requires the disclosure, in a single reference, of each and

every element of a claimed invention, and an Examiner must identify wherein each and every facet of the claimed invention is disclosed in the applied reference. See, In re Levy, 17 USPQ2d 1561 (Bd. Pat. App. & Inter. 1990). Appellant respectfully submits that the '831 reference fails to anticipate the claimed invention on the grounds that it fails to disclose each and every element thereof.

More particularly, the present invention requires that its pearlizing wax, emulsifier and polyol ester be present in its pearlizing composition in an amount of at least about 55% by weight, based on the weight of the composition. Nowhere within the '831 reference is this limitation disclosed. Consequently, for this reason alone, the '831 reference fails to anticipate the present invention.

However, Appellant respectfully submits that yet another reason exists as to why this reference fails to anticipate the claimed invention. The present invention is based on the surprising discovery that by employing a **certain amount** of a polyol ester, a pearlescent concentrate having a high concentration of actives, while still being flowable at room temperature, can be formed. With respect to the '831 reference, nowhere within the four corners of said reference is this surprising discovery disclosed, suggested, hinted at or motivated.

The Examiner relies upon the reference's teaching in col. 3, lines 55-58 relating to the use of polyol esters as providing a basis for his finding of anticipation. However, upon careful review of this relied upon teaching, it is seen that polyol esters constitute merely **one** of a great number of nonionic surfactant candidates which **MAY** but need not be, present in its composition. The '831 reference identifies **five classes** of surfactants which might be employed in its pearlescent concentrate. Each class, in turn, contains numerous candidates which may be employed. Nowhere within the four corners of the reference is there even a mention relating to the use of the claimed polyol esters, in the **claimed amount**, for the purpose of allowing for the formulation of a pearlescent concentrate having a high degree of actives and being flowable at room temperature.

Appellant would like to note that it is well settled in the law that in order to anticipate the claims, the claimed subject matter must be disclosed in a reference with "sufficient

specificity to constitute an anticipation under the statute." Thus, if the claims are directed to a narrow range, the reference teaches a broad range, and there is evidence of unexpected results within the claimed narrow range, depending on the other facts of the case, it may be reasonable to conclude that the narrow range is not disclosed with "sufficient specificity" to constitute an anticipation of the claims. The unexpected results may also render the claims unobvious. See, *MPEP section 2131.03*.

Here, the '831 reference discloses a broad range of surfactant candidates which may be used in its pearlescent concentrate, as well as a broad range of amount thereof which may be used, i.e., from 0.1 to 90%. The claimed invention, on the other hand, has identified a very specific type of nonionic surfactant, which is used within a much narrower weight range than is disclosed in the '831 reference, in order to enable a pearlizing composition having a high degree of actives, while at the same time being flowable at room temperature, to be formulated. Moreover, the unexpected results associated with the use of the polyol ester with regards to sparkle, particle fineness and opacity, are clearly seen in the examples. Since the '831 reference fails to disclose with "sufficient specificity" the use of the **claimed polyol esters**, in the **claimed amount**, this reference should not serve to anticipate the claimed invention. The unexpected results associated with the use of the claimed polyol esters, in the claimed amount, further serves to establish the "non-obviousness" of the invention as well, per *MPEP section 2131.03*.

SUMMARY

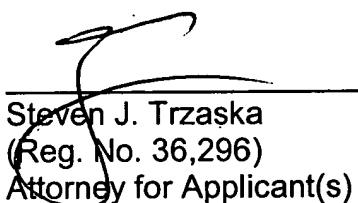
Ansmann '831 fails to anticipate the claimed invention on the grounds that it fails to disclose each and every element thereof.

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It is requested for the reasons given above, that the Board find for Appellant on all of the issues, and reverse the Examiner's Final Rejections.

Respectfully submitted,

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Enc.: Appendix

APPENDIX

CLAIMS ON APPEAL

11. A highly concentrated flowable pearlizing concentrate comprising: (a) from about 25 to about 45% by weight of a pearlizing wax selected from the group consisting of an alkylene glycol ester, a fatty acid alkanolamide, a partial glyceride ester of a polybasic carboxylic acid, a partial glyceride ester of a polybasic hydroxysubstituted carboxylic acid, a fatty alcohol, a fatty acid, a fatty ketone, a fatty aldehyde, a fatty ether, a fatty carbonate, ring opening products of olefin epoxides and mixtures thereof; (b) from about 25 to about 40% by weight of nonionic, amphoteric, zwitterionic and/or cationic emulsifier and; (c) from about 0.5 to about 15% by weight of a polyol ester and the remainder water wherein the sum of components (a), (b) and (c) is at least 55% by weight.

13. The concentrate of claim 11 wherein the nonionic surfactant is selected from the group consisting of adducts of from about 2 to about 30 moles of ethylene glycol, from 0 to about about 5 moles of propylene glycol or a combination thereof with linear fatty alcohols having from about 8 to about 22 carbon atoms or fatty acids having from about 12 to about 22 carbon atoms or alkyl phenols having from about 8 to about 15 carbon atoms in the alkyl group or alkyl amines having from about 8 to about 22 carbon atoms in the alkyl group; alkyl mono- and oligoglycosides having from about 8 to about 22 carbon atoms in the alkyl group; addition products of castor oil or hydrogenated castor oil and from about 1 to about 15 moles of ethylene oxide or from about 15 to about 60 moles ethylene oxide; a di- or tri-PEG alkyl phosphate and salts thereof; a wool wax alcohol; a copolymer of polysiloxane and a polyalkyl ether; a polyalkylene glycol; a glycerol carbonate.

14. The concentrate of claim 11 wherein component (c) is cocamidopropyl Betaine and/or an esterquat.
15. The concentrate of claim 11 wherein component (c) is selected from the group consisting of a partial ester of glycerol or sorbitan wherein the acid portion of the ester is a saturated or unsaturated, linear or branched fatty acid having from about 12 to about 22 carbon atoms or a hydroxy-substituted carboxylic acid having from about 3 to about 18 carbon atoms and adducts thereof having 1 to about 30 moles of ethylene oxide; a partial ester of polyglycerol, polyethylene glycol, trimethylol propane, pentaerythritol, an alkyl polyglucoside wherein the acid portion of the ester is a saturated or unsaturated, linear or branched fatty acid having from about 12 to about 22 carbon atoms or a hydroxy-substituted carboxylic acid having from about 3 to about 18 carbon atoms and adducts thereof having 1 to about 30 moles of ethylene oxide; mixed esters of pentaerythritol, fatty alcohols and fatty acids and citric acid; mixed esters of fatty acids having from about 6 to about 22 carbon atoms; a mixture of methyl glucose and a polyol.
16. The concentrate of claim 11 further comprising a polyol.
17. The concentrate of claim 16 wherein the polyol is glycerol and/or ethylene glycol.
18. The concentrate of claim 17 wherein the amount of the polyol in the concentrate is from about 0.1 to about 15% by weight of the concentrate.
19. A process for the production of the pearlizing concentrate of claim 11 comprising heating a mixture of components (a), (b), (c) and optionally (d) to a temperature of from about 1 to about 30°C above the melting point of the mixture; (2) adding a quantity of water to the mixture sufficient to result in a concentrate of a predetermined water content; (3) cooling the composition of step (2) to room temperature.

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20. A process for increasing the viscosity of a pearlescent concentrate having an active substance content of at least 55% by weight comprising adding a viscosity increasing effective amount of a polyol ester to the pearlescent concentrate.